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Employer Solicitation Policies: Unions Versus Charity

Michael J. Borree*

I. INTRODUCTION

The organization of workers for the purpose of collectively addressing issues of labor conditions, such as wages, with employers has long been hailed as a protection against employer abuses in setting such conditions. This is reflected in the National Labor Relations Act (NLRA),¹ the establishment of the National Labor Relations Board (NLRB) as the enforcer of the Act,² as well as in the rise of the modern union. Section 7 of the NLRA allows employees the right to organize, form, join, or assist a labor organization.³ In addition, this section extends to employees the right to bargain collectively with the employer.⁴ The enforcement of such rights is reflected in § 8(a)(1) of the Act, which provides: "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."⁵

An obvious precursor of the realization of the rights provided in § 7 would seem to be the ability of a union to gain access to employees for the purpose of organizing. The 1992 Supreme Court decision in *Lechmere, Inc. v. NLRB*⁶ may have placed a restriction on this ability. The Court in *Lechmere* held that an employer does not need to extend union, nonemployee, organizers a right of access to their property, unless other means of access do not exist or the employer discriminates

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1. 29 U.S.C. § 151-169 (1988). It is important to note that the NLRA only applies to private sector employees. This article's analysis is confined to private sector employees as compared to public sector. The act does not cover individuals employed in the railroad and airline industries. The purpose of the Act is to protect employees against employer abuses of bargaining power.

2. 29 U.S.C. § 153 (1988). The Board was actually created by Amendment to the National Management Relations Act in 1947.

3. 29 U.S.C. § 157 (1988). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.*

4. *Id.*

5. 29 U.S.C. § 158(a)(1) (1988).

6. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

against the union.⁷ The Court found that nonemployees are not entitled to access for the purpose of organizing because § 7 “confers rights on only employees, not on unions or their nonemployee organizers.”⁸

Lechmere may represent a crossroads for both unions and employers in the legal system’s struggle to define the outer limits of an employee’s rights to fulfill the promises of § 7. It may also represent an acknowledgment from the Supreme Court that an employer should be granted certain rights to use its property as it see fits. As such, employers often allow access to groups soliciting information or contributions.⁹ To what extent does an employer’s issuance of access to these groups discriminate against union requests for access? As far back as 1949 the Supreme Court espoused the position that employers may not discriminate against unions in such a manner. In *NLRB v. Stowe Spinning Co.*, the Court found that the NLRB may find a violation of § 8(a)(1) where an employer denies a union access to company property while allowing other outside groups such access.¹⁰ According to *Stowe*, giving access to non-union groups while excluding unions amounts to discrimination and is a violation of the NLRA.¹¹

As a result of *Lechmere*, the labor movement was forced to reevaluate union organizing tactics. As a result, many of the unions instituted, or reinstituted, a practice termed “salting.”¹² The practice occurs when a company employs a paid union organizer or sympathizer for the purposes of educating the workforce about the organizer’s union and eventually conducting an organizational campaign.¹³ Once the union organizer becomes employed, he may exercise § 7 rights. An employer may not, as a result, discharge the employee, nor refuse to hire a prospective employee based on the applicant’s union

7. *Lechmere*, 502 U.S. at 537.

8. *Id.* at 532.

9. Such contributions may include, but are not limited to groups such as the Red Cross, the United Way or the Girl Scouts of America.

10. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949). An employer may not discriminate against a labor organization by denying use of a company-owned hall while allowing other non-union groups to use the hall.

11. *Id.*

12. Victor J. Van Bourg & Ellyn Moscovitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer’s Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 1 (1998).

13. *Id.* at 5.

affiliation.¹⁴ As a result of the ruling in *Lechmere*, unions have attempted to expand the practice of "salting".¹⁵

The Federal Appeals Courts have handed down a number of decisions since *Lechmere* that address discrimination of union activity by employers.¹⁶ However, it does not appear that any of the cases decided since *Lechmere* give a clear definition as to what constitutes discrimination of union activity. In fact, it would appear that the decisions of the courts in these cases have actually complicated the issue. As well, the Supreme Court has yet to grant certiorari in a case involving a claim of discrimination by a union.¹⁷ Thus, employers are without a clarification of what non-union activities, if any, they may permit on its premises so as to avoid a claim of discrimination by a union whose organizers have been barred from the property.

This article will argue that it is crucial for the Supreme Court to grant certiorari in a case that addresses a claim of discrimination (and a violation of the NLRA) by a union that has been excluded from an employer's premises while other groups have been granted access for their activities. The cases that the Federal Appeals Courts have decided in this area involve a number of issues. First, *Lechmere* obviously placed a stranglehold on a union's attempt to organize employees through nonemployee organizers. Yet, one may also argue that other channels of access to employees exist so as to lighten the blow of *Lechmere*. In addition, the question must be asked regarding the role the union tactic of salting has played in easing the impact of *Lechmere*. Commentators have argued that the practice of salting has to some extent negated the effect *Lechmere* had on union organizing efforts.¹⁸

This issue also has implications for the property rights of employers and their ability to carry on operations without distraction from activities and groups that may have a negative impact on business. Should we allow employers to make decisions as to what kinds of activities may be allowed on their premises based on what is least damaging to the interests of business?

14. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). A worker may be both covered by the NLRA as an employee of the company as he or she is simultaneously a paid union organizer. Thus, once the employee becomes part of the workforce, he or she may solicit union information to the employees.

15. Van Bourg & Moscovitz, *supra* note 12, at 4.

16. See *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001); *Four B Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. 1998); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

17. The Supreme Court has not revisited the issue presented in *Lechmere*.

18. Van Bourg & Moscovitz, *supra* note 12, at 4.

This article will argue that the Supreme Court must narrow its exception for discrimination first enunciated in *NLRB v. Babcock & Wilcox Co.*¹⁹ and *Lechmere*. The Supreme Court must find the prohibition of discrimination, in this context, to mean that employers may not discriminate among unions.²⁰ The NLRB and courts should not find violations of the NLRA to occur when an employer allows charitable groups to solicit while excluding union organizers. These arguments are based on several points. First, the increased ability of nonemployee union organizers to gain access to employees away from company premises decreases the need to have access to the employer's property. Likewise, the perceived expansion of salting has taken some of the sting out of *Lechmere's* effects on unions. Third, the protection of an employer's property right to exclude others based on state law is persuasive, as well.

The present state of the law in this area often makes a distinction between union organizational activities and union activities involving "handbilling"²¹ or protesting. Union organizational activities are often given a greater degree of protection under the NLRA than activities involving union protests of employer activities on employer property.²² This article will also argue that it is wise to uphold such a distinction.

In Part II (Background) of this article, the procedural course of labor grievances will first be outlined. This section will also discuss the rights of employers to exclude under the ambit of core property rights and state trespass laws. Next, the activities of unions in organizing and protesting will be discussed in the context of nonemployee access. Part II will give a history of the conflict existing between the NLRB and the Courts regarding what constitutes discrimination. In addition to the conflict existing between the Board and the courts, several Circuit Courts of Appeals have issued decisions that bear conflicting tones. These conflicts will be addressed.

19. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). See *supra* note 2. The discrimination exception stated that an employer may only prohibit nonemployee union organizational activities if the employer does not discriminate by allowing other forms of activity.

20. 29 U.S.C. § 158(a)(2) (1988). Employers are not allowed to allow one union on their premises while excluding another, rival union. Such an action would not only constitute blatant discrimination but it would also be a violation of § 8(a)(2) of the NLRA which prohibits an employer from giving support to a union: "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ." *Id.*

21. "Handbilling" is the term that refers to the union practice of passing out flyers containing information intended to dissuade the public from patronizing a company that has acted adversely to the union's interests.

22. See *Sandusky Mall*, 242 F.3d at 692.

Part III will investigate the current state of union activity. Unions argue that *Lechmere* represents a severe impediment to the realization of employees' right to organize. Unions state that there is a correlation between the Court's holding in *Lechmere* and statistics reflecting declines in organization.

Part III will next provide some clarity to the jumbled state of precedent following *Lechmere*. This section will first give a summary of what broad guidelines may be drawn from existing law. Next, this article will attempt to discern what the Supreme Court truly meant by the word "discriminate" in *Lechmere*. And finally, justifications will be made for a narrowed tailoring of the word "discriminate".

II. BACKGROUND

Before discussing the current state of the law in this area, it is first necessary to highlight the procedural route labor conflicts take through their ruling bodies. Next, it is necessary to look at the impact property rights and the trespass laws have on the exclusion of unions from an employer's premises. The remainder of the Background will focus on the current conflicts present in the NLRB's and the various circuit courts' readings of the Supreme Court's holding in *Lechmere*.

A. *Procedural Differences*

To better understand the history of law in this area, it is first necessary to explain the procedure for addressing grievances under the NLRA. When a union, an employee, or an employer files a grievance alleging a violation of the NLRA, an unfair labor practice ("ULP") is filed. Upon filing this charge, an administrative law judge ("ALJ") will grant a hearing to address the charge. Administrative law judges are situated throughout the country at district locales that the NLRB maintains. After conducting the hearing, the ALJ will make a ruling (either in favor of the union or the employer). Following this ruling, the parties have the option of appealing the ALJ's order to the NLRB. If this option is exercised the Board, comprised of five members, will then hear the case in full.²³ Or alternatively, the five-member board may delegate this authority to a panel of three members.²⁴ Following its order, the parties have the option of appealing to the appropriately situated Federal Appeals Court. The party that is appealing the Board's order is able to choose this court. This court may

23. ARCHIBALD COX ET AL., LABOR LAW 107 (2000).

24. 29 U.S.C. § 153(b). "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.*

either be the Court situated where the violation took place, where the petitioner does business, or in the Court of Appeals for the District of Columbia.²⁵ Finally, the Supreme Court may grant certiorari if it believes that the filing petitioner was aggrieved by the Appeals Court's decision.²⁶

B. *The Right To Exclude*

The right of property owners to exclude others from their property is often characterized as the most fundamental right of the three core property rights.²⁷ Thus, a threshold issue in determining whether an employer has violated § 8(a)(1) is whether it had a right to exclude in the first place. Was the property actually owned by the employer, vesting him with the right to exclude?²⁸ Often, parties to a dispute over such an exclusion will argue over whether the employer had such a right in the first place. For instance, where an employer has excluded union protesters from a sidewalk adjacent to the property, the union may argue that the protesters were lawfully there since the employer had no property interest in the sidewalk.²⁹ For purposes of this article, it will be assumed that the employer holds a valid property right to exclude others.

The exercise of the property right to exclude falls under the ambit of state trespass law.³⁰ However, under the NLRA the union clearly has the right to engage in such activities so as to realize its § 7 rights. Suppose an employer attempts to bar a union from engaging in protest activities on its property based on state trespass law. Employees have the right to engage in concerted activity under the NLRA.³¹ Thus, a conflict exists. Even though an employer may eject persons from its property based on state trespass law, employees (under the NLRA) have a federal right to engage in economic protest activities. The question that arises at this point is whether the NLRA preempts state jurisdiction over a trespass claim?

25. ARCHIBALD COX, *supra* note 23, at 108.

26. *Id.*

27. EDWARD RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 1 (2000). The other two core property rights being the right to possess property and the right to dispose of, or alienate, the property.

28. See *Calkins (Indio Grocery Outlet)*, 323 N.L.R.B. 1138, 1141 (1997). See also *Local 400 v. N.L.R.B. (Farm Fresh Acquisition, Inc.)*, 222 F.3d 1030, 1035 (D.C. Cir. 2000). The right of employers to exclude union organizers emanates from state property law.

29. *Farm Fresh Acquisition, Inc.*, 222 F.3d at 1033.

30. *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 181 (1978).

31. 29 U.S.C. § 157 (1988).

In *Sears, Roebuck & Company v. San Diego District Council of Carpenters*,³² the Supreme Court addressed this issue. A carpenter's union established a picket line on Sears' property after determining that certain work in the employer's store was not being performed by workers from the union's hiring hall as agreed upon. Sears obtained an injunction barring the union's trespass.³³ The California Supreme Court determined that its lower state courts did not have jurisdiction to issue an injunction because the employees' right to engage in protest activities was protected under Federal law.³⁴ The Supreme Court reversed the California decision.

In a 6-3 decision, the Court held that so long as the employer is only challenging the legality of the protester's location, not the legality of the protest itself, state jurisdiction to hear the trespass claim is not pre-empted.

Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices.³⁵

Thus, an employer's action of ejecting protesters from its property falls under state law where the employer is not challenging the legality of the protest itself.

The NLRA does not limit the places in which an employee's § 7 rights may be exercised.³⁶ Employees would seem to be able to engage in organizational and protest activities on their employer's property. However, *Sears Roebuck* raises severe doubts as to this ability. Even if an individual may engage in union activities on company premises, as the next section illustrates, this right is confined only to those persons termed "employees".³⁷

C. *The Three Core Rights Of Employers . . . And Only "Employees"!*

The NLRA extends three core rights to employees: (1) to organize; (2) to bargain collectively with the employer over wages and other terms and conditions of employment; and (3) to engage in "concerted

32. 436 U.S. 180 (1978).

33. *Id.* at 182-83.

34. *Id.* at 180.

35. *Id.* at 198.

36. See *supra* note 3. Notice that the statutory language of § 7 does not place restrictions on the locations where these rights may be exercised.

37. See *infra* Part II.C.

activity".³⁸ Although § 7 of the Act extends these rights, they are not implemented until later sections.³⁹ The language of the NLRA only extends these rights to "employees". The language of § 7 does not extend these rights to unions. Although some commentators would argue that § 7 should be read to extend protection to union employees, the holding in *Lechmere* indicates § 7 does not extend such rights to employees of a union.⁴⁰ Rather, "employees" is interpreted to mean those persons under the employ of the business.⁴¹

This proposition is exemplified by drawing a distinction between the court's holdings in *Republic Aviation v. NLRB*⁴² and *Lechmere*. *Republic Aviation* held that it was a violation of § 8(a)(1) for an employer to ban employee organizing activities in the workplace where such activities occur during an employee's own time.⁴³ *Lechmere*, on the other hand, provides that it is not a violation for an employer to ban activities of non-employees where the activities occur on an employer's premises since these are not activities by employees as defined under the NLRA.⁴⁴ Unions may argue that the NLRA should be amended to include nonemployee organizers within the definition of "employees". In light of the Court's holding in *Lechmere*, this is unlikely.

In *ITT Industries v. NLRB*,⁴⁵ the Court of Appeals for the District of Columbia further clarified the grant of § 7 rights. In this case, employees situated at one manufacturing site engaged in protest activities at a second site owned by the same employer. The employer attempted to bar the employees from the property. The employer believed he was accorded this right based on *Lechmere*.⁴⁶ However, the court ruled that the employees enjoy § 7 rights where they are employed by the same operation, no matter the location.⁴⁷ It was immaterial that these employees were not actually employed for work at

38. See *supra* note 3.

39. *Id.* Section 8(a)(1) makes it an unfair labor practice for an employer to restrain employees in the exercise of their rights granted in § 7. Section 7 grants the three rights to employees. Yet, without the threat of sanction imposed by § 8(a)(1), § 7 rights are essentially meaningless. Section 8(a)(1) is the enforcement mechanism for employees aggrieved of their rights guaranteed under § 7.

40. See *supra* note 6.

41. *Id.*

42. 324 U.S. 793 (1945).

43. *Republic Aviation*, 324 U.S. at 796. Such 'own time' may be construed to mean lunch or other break times.

44. *Supra* note 8.

45. 251 F.3d 995 (D.C. Cir. 2001).

46. *Id.* at 1005.

47. *Id.* at 1004. 48 NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).

this specific site. Rather, because the employees worked for the same employer, they could engage in activities at this site.

As stated, *Stowe*⁴⁸ appears to be the first case addressing discriminatory conduct by an employer in denying access to its property by a union. However, *Babcock* seems to set the stage for the present controversy. In *Babcock* the Supreme Court stated, "an employer may validly post his property against nonemployee distribution of union literature."⁴⁹ The decision does carve an exception to this rule. An employer may not post such bans where other channels of communication do not exist for a union to relay its message to employees.⁵⁰ Although this exception may give unions some solace, it appears that the situations in which such channels cease to exist are rare.

Babcock's reference to the clash between the property rights of employers and the rights granted to employees under the NLRA has great applicability to the present controversy:

Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.⁵¹

Babcock seems to imply that a balancing must be rendered between such rights in the same breath that it finds the employer may impede organization. However, The Court never explicitly stated that such a balance is necessary. Under *Babcock*, an employer may ban nonemployee, union solicitation on its property.

Following *Babcock*, but pre-*Lechmere*, several unions claimed a First Amendment right to distribute union materials on company property. The Supreme Court rejected such notions. In *Lloyd Corp. v. Tanner*,⁵² the Court found that a union had no First Amendment right to use privately owned property for distributing handbills and other related activity where the employer had placed a general no-solicitation ban.⁵³ This decision seemed to clarify the approach to the First Amendment claim in *Central Hardware Co. v. NLRB*.⁵⁴ In *Central Hardware*, the Supreme Court held that a non-employee could not have a First Amendment claim upheld unless the employer's property

48. 336 U.S. 226.

49. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

50. *Id.* at 111.

51. *Id.*

52. 407 U.S. 551 (1972).

53. *Id.* See also *Hudgens v. NLRB*, 424 U.S. 507 (1976).

54. 407 U.S. 539 (1972).

had "to some degree the functional attributes of public property devoted to public use."⁵⁵ Thus, at this point, nonemployee union organizers were unable to find cover for organizational activities under the First Amendment, nor the NLRA, except in circumstances where alternative channels of communication did not exist or the employer's rejection fit the exception for discrimination.⁵⁶

D. *Jean Country*

In *Jean Country*,⁵⁷ the NLRB announced a new test that balanced the organizational rights of § 7 against the property rights of the employer:

In all access cases our essential concern will be (1) the degree of impairment of the Section 7 right if access should be denied as it balances against (2) the degree of impairment of the private property right if access should be granted. We view the consideration of (3) the availability of reasonably effective alternative means as especially significant in this balancing process.⁵⁸

This balancing test conflicts with the Court's holding in *Babcock*. The Court in *Babcock* implied that a balancing of factors regarding access, property rights, and § 7 rights, could be employed. However, it never explicitly stated that such was necessary. Thus, the Supreme Court may have felt a need to reexamine *Babcock* following *Jean Country*. It did so in *Lechmere*.

E. *Lechmere*

In *Lechmere*, a union began a campaign to organize a retail store's two hundred employees. The union took out a full-page advertisement in a local newspaper seeking support for an organizational campaign at the store. After the advertisement failed to garner significant response, "nonemployee union organizers entered Lechmere's parking lot and began placing handbills on the windshields of cars parked in a corner of the lot used mostly by employees."⁵⁹ Following efforts by Lechmere's management to bar the organizers from the parking lot, the union attempted to contact the employees through the mail, by telephone and even through home visits. When these efforts were

55. *Id.* at 547.

56. *Babcock & Wilcox*, 351 U.S. at 112.

57. 291 N.L.R.B. 11 (1988), *abrogated by* *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). 58 *Id.* at 14.

58. 291 N.L.R.B. at 14.

59. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

unsuccessful in organizing support,⁶⁰ the union filed an unfair labor practice against *Lechmere* alleging that it had violated § 8(a)(1) by preventing the nonemployee organizers from gaining access to its property.⁶¹

The Administrative Law Judge, the NLRB and the First Circuit Court of Appeals ruled in favor of the union based on *Jean Country*. However, The Supreme Court ruled that the First Circuit's decision should be overruled and that the order of the NLRB should be denied.

In an opinion by Justice Thomas,⁶² the Court found that an employer cannot be compelled to allow nonemployee organizers onto its property, under *Babcock*, unless "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels."⁶³ The Court did not find such circumstances to exist here. The Court went on to find that a balancing of factors set out in *Jean Country* was inconsistent with its holding in *Babcock*.⁶⁴ In essence, the Court's decision in *Lechmere* reaffirmed and invigorated its holding in *Babcock* while discarding the balancing test favored by the NLRB in *Jean Country*.

The Court in *Lechmere* placed the burden of displaying a lack of alternative means of communication on the union. The Court also reaffirmed the discrimination exception of *Babcock*. It stated that if the union was able to show discrimination on the part of the employer, this may also result in a violation of the NLRA: "to gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation."⁶⁵ Thus, *Lechmere* posits two ways by which nonemployee union organizers may gain access to an employer's property in the face of a ban on such access: (1) the union may either carry the burden of showing that no alternative channels of communication ex-

60. The union was able to gain only one authorization card. In order for a union to be granted the right to hold an election in which employees decide whether they desire union representation, the union first must receive authorization cards from one-third of the workforce demonstrating their interest in being represented by the union.

61. *Lechmere*, 502 U.S. at 529.

62. This was Justice Thomas' first written opinion as a Justice of the Supreme Court.

63. *Lechmere*, 502 U.S. at 527-28 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

64. *Id.* at 538. *Jean Country* significantly erodes "*Babcock's* general rule that an employer may validly post his property against nonemployee distribution of employee literature. We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test." *Id.*

65. *Id.* at 535 (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)).

ist so as to effectively reach the employees; or, (2) it may show that the employer's decision to allow other groups of nonemployees on its property discriminates against the union. Although, neither path has opened a floodgate for claims of nonemployee access, it is obvious that unions have found more success in the discrimination context.

Lechmere cleared the air regarding the conflict between its holding in *Babcock* and the Board's favored balancing test in *Jean Country*. However, the Court in *Lechmere* did not examine or explain exactly what constitutes discrimination. Whereas the Court provided instances in which an employee's § 7 rights could be denied (and access should be allowed by nonemployees) due to the lack of communication channels, it gave no such examples of instances in which discrimination violates these rights.⁶⁶ The Supreme Court has yet to provide any such examples or guidance on the issue. Thus, debate among the numerous Circuit Courts of Appeal as the circumstances under which an employer discriminates has confused both unions and employers alike. The current division between the NLRB and the courts, as well as conflicts between the courts themselves provides impetus for the need for guidance.

F. When Does An Employer Discriminate Against The Union?

1. Division between NLRB and the Courts

"It is unclear what outside groups an employer can allow on its property while lawfully excluding nonemployee union representatives."⁶⁷ It can be generally said that the NLRB and the Courts disagree on what amounts to discrimination. Courts generally distinguish between an organizational activity and a protest activity.⁶⁸ Courts have tended to find discrimination and a violation of the Act where an employer defers to one union over the other.⁶⁹ The NLRB will likely find the same. However, courts are, on average, less likely to find discrimination where the union is engaged in protest activities.

66. *Id.* at 539-40. The court refers to prior holdings in citing examples where nonemployee access should be available: logging camps (quoting NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (1948)), mining camps (quoting Alaska Barite Co., 197 N.L.R.B. 1023 (1972)), or mountain resort hotels (quoting NLRB v. S & H Grossinger's, Inc., 372 F.2d 26 (1967)).

67. Deborah L. Stein, *Keep Off the Grass: Prohibiting Nonemployee Union Access Without Discriminating*, 73 N.Y.U. L. REV. 2029, 2039 (1998).

68. See *supra* note 22.

69. *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996) (stating that "Although the Court has never clarified the meaning of the term [discrimination], and we have found no published court of appeals cases addressing the significance of 'discrimination' in this context, we hold that the term 'discrimination' as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information."). See also *supra* note 20.

The NLRB doesn't seem to make such a distinction.⁷⁰

2. *Be-Lo Stores and Its Exceptions*

In *Be-Lo Stores*,⁷¹ the NLRB carved out two exceptions in which it would not find discrimination in an employer's act of allowing non-union solicitations while enforcing a rule against union solicitations. The Board stated that it would find no violation where employers allow "work-related activities" or "isolated beneficent acts" while excluding union activities.⁷² Nonetheless, the NLRB found that discrimination of a no-solicitation rule existed where members of a Muslim group sold oils and incense, an "occasional" Jehovah's Witness distributed magazines, and solicitations by the Lion's Club were "occasionally" allowed.⁷³

It is quite peculiar that it took the NLRB until 1995 to carve these exceptions into its general stance on discrimination in light of its holding in *Hammary*.⁷⁴ In *Hammary*, the Board allowed an employer to enforce a no-solicitation policy on its premises against a union while allowing the employer to make an exception to a United Way drive. The Board placed a particular emphasis on the number of exceptions the employer permitted.⁷⁵ Thus, the "isolated beneficent acts" exception seems to imply that there is a certain threshold, which an employer must stay below in allowing for exceptions to a no solicitation rule. It is not clear why this exception was not solidified until *Be-Lo's* holding, which was thirteen years after *Hammary*.

G. *Where The Courts Currently Stand*

Courts have been very reluctant to adopt an approach like that of the NLRB in quantifying the number of acts an employer may be permitted to allow on its property before a finding of discrimination takes place. Rather, courts have preferred to delineate between organizational activities and those activities in which a union is promoting a

70. See *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996). Both cases are exemplary of the notion that the Board has been likely to find a violation of the NLRA where an employer allows solicitation by other groups and excludes the union's protest activities. However, the Circuit Court of Appeals seem to lend little deference to these decisions and will often draw distinctions between union activities that are organizational in nature as opposed to those that are protests aimed at an employer.

71. 318 N.L.R.B. 1 (1995).

72. *Id.* at 11.

73. *Id.* at 15.

74. 265 N.L.R.B. 57 (1982).

75. *Id.* Although the Court found that the employer had discriminated against the union in allowing for employee raffles and certain collections, it nonetheless seemed to indicate that had the United Way drive been the only exception, it would not have found a violation.

certain cause relating to economics such as handbilling.⁷⁶ Nonetheless, some circuits have referred to the Board's finding in *Be-Lo Stores*, finding violations of § 8(a)(1) where employers have denied union organizers access. Consequently, much confusion has resulted.

1. *Be-Lo Stores*

Following the Board's finding that Be-Lo violated § 8(a)(1), the Fourth Circuit Court of Appeals overruled the order.⁷⁷ The Fourth Circuit did not address whether the NLRB should engage in granting exceptions for employer discrimination. In failing to address whether such exceptions should be referred to, the court implied that no such analysis was needed. An employer's act of prohibiting nonemployee protests while allowing for non-union solicitations did not amount to discrimination. The court illustrated an important point. The court stated that the Supreme Court could not have intended the word "discriminate" to mean that an employer commits a § 8(a)(1) violation by allowing distribution of nonunion literature on its premises, while excluding union, nonemployee picketers.⁷⁸ The court struck down the Board's order partly on the basis that claims of access by nonemployees "are at their nadir when the nonemployees wish to engage in protest or economic activities" as opposed to purely organizational activities.⁷⁹ The Fourth Circuit drew a line in the sand: where access is for the purpose of protest, a claim of discrimination by the employer will not be heard in the same light as one in which the access is for the purpose of organizing.

Be-Lo Stores exemplifies the conflict that exists between the NLRB and the Courts. In reviewing the Administrative Law Judge's ruling that the employer did indeed discriminate, the Board carved exceptions to *Babcock* and *Lechmere* so as to uphold the finding of discrimination. The Fourth Circuit took the opposite stance, refusing to engage in analysis of whether an exception should be made.

2. *Cleveland Real Estate Partners*

In 1996 in *Cleveland Real Estate Partners*,⁸⁰ the Sixth Circuit Court of Appeals reversed a Board's finding of discrimination where a mall

76. See *supra* note 22.

77. *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997).

78. *Id.* at 285. "To affirm the Board's contrary finding on this record would be tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid union picketers. We are confident that the Supreme Court never intended such a result." *Id.*

79. *Id.* at 284 (quoting *UFCW v. NLRB*, 74 F.3d 292, 300 (D.C. Cir. 1996)).

80. *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

manager barred union protests against one of the mall's stores, but the mall allowed patrons to be solicited by charitable organizations. The Court here seemed to narrow the scope of a claim of discrimination: "To discriminate in the enforcement of a no solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so."⁸¹ Rather, the Court believes that discrimination should be limited to instances where an employer favors one union over another in that it allows one to solicit to the exclusion of the other.⁸²

As well, the Court appeared to defer to public policy judgments in noting "no relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature."⁸³ This implies that the Sixth Circuit is not merely confining its analysis of this issue to precedent and interpretation of the NLRA alone. Rather, it is extending its analysis to encompass considerations of advancing the labor movement's aims.

3. *Riesbeck Food Markets*

Also in 1996, the Fourth Circuit Court of Appeals overturned a NLRB finding of discrimination in *Riesbeck Food Markets, Inc. v. NLRB*.⁸⁴ In a prelude to its decision in *Be-Lo Stores*, the Fourth Circuit indicated that it would protect an employer's right to channel the messages communicated on its property: "an employer must have some degree of control over the messages it conveys to its customers on its private property."⁸⁵

The court also made a distinction regarding the effects of certain protests. The court found that Riesbeck's purpose of selling goods would clearly be undermined by union protests urging customers not to patronize the business. Whereas, charitable solicitations do not pose such a threat to the business's purpose.⁸⁶ The court went on to state that such a distinction could be weakened if the employer allowed political organizations to convey potentially controversial messages. However, since there was no evidence of the employer

81. *Id.* at 465.

82. *Id.* at 464-65.

83. *Id.* at 465.

84. *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1766, 95-1917, 1996 WL 40524 (4th Cir. 1996).

85. *Id.* at *13.

86. *Id.* at *14.

granting such permission, the employer did not treat the union adversely.⁸⁷ The court focused merely on the effects of the discrimination. Perhaps under such an analysis, even if an employer intended to discriminate against a union, so long as the effects of the discrimination are not egregious, there is no violation of § 8(a)(1).

4. *Lucile Salter Packard*

In *Lucile Salter Packard Children's Hospital v. NLRB*,⁸⁸ the Court of Appeals for the District of Columbia upheld a NLRB determination of discrimination of a no-solicitation policy. Also decided in 1996, the court deferred to the exceptions enunciated by the Board in *Be-Lo Stores*.⁸⁹ In upholding the Board's finding of a violation of § 8(a)(1), the Court found that the employer's allowance of certain solicitations did not meet the exception for "business related activities" or "isolated beneficent acts."⁹⁰

The Lucile Salter Packard Children's Hospital ("the Hospital") had an official no-solicitation policy.⁹¹ Despite the policy, the Hospital allowed certain groups to solicit within the Hospital.⁹² When a local union attempted to gain access to the property for the purpose of organizing the Hospital's employees, their request was refused by the Hospital's administration.⁹³ The Union filed a ULP against the Hospital. The ALJ and the Board found that by permitting numerous non-union solicitations, the Hospital had discriminated against the union in its application of the policy.⁹⁴

Upon review by the D.C. Circuit, the Hospital argued that the other solicitations fell under the exception outlined in *Be-Lo Stores* relating to business functions. The Court agreed with the ALJ and the Board and found that these solicitations did not relate to the enhancement of

87. *Id.* at *15-16.

88. 97 F.3d 583 (D.C. Cir. 1996).

89. It should be noted that the D.C. Court of Appeals has long been hailed as being more receptive to orders and decisions of the National Labor Relations Board than its counterparts in the other circuits.

90. *Lucile Salter Packard Children's Hosp.*, 97 F.3d at 590.

91. *Id.* at 586. In order to prevent disruption in the operation of the hospital, interference with patient care, and inconvenience to our patients and their visitors, the following rules will apply to solicitation and distribution of literature on hospital property. *Outsiders*: Persons not employed by the hospital may not solicit or distribute literature on hospital property for any purpose at any time *Id.*

92. The groups that set up tables for the purposes of soliciting hospital employees included a credit union and a child daycare center. *Id.* The Hospital also, at times, authorized medical textbook vendors to set up displays on the property, as well as a voluntary association of hospital employees selling gifts, and the like. *Id.*

93. *Id.*

94. *Lucile Salter Packard Children's Hosp.*, 97 F.3d at 586.

health care nor the work environment. The services and products offered by the nonunion solicitors were not intrinsic to the Hospital's operations.⁹⁵ Since the solicitations were for purely commercial purposes, the hospital could not defend its disparate application of the no-solicitation policy on the grounds that these solicitations were charitable in nature.⁹⁶

Three points are worth noting in the court's decision. First, nowhere within the opinion did the court differentiate between an employer's act of prohibiting union organizational solicitations as opposed to banning protests. The Union's actions were organizational. It is not clear from the court's opinion whether the outcome would have been different had the union's actions been for the purposes of an economic protest.

Second, this decision was handed down before the Fourth Circuit ignored the exceptions enunciated by the Board in *Be-Lo Stores*. Thus, under the Fourth Circuit's reasoning, the Hospital would not have had to defend its disparate application of the policy on the grounds that it fell into one of the two exceptions. The exceptions would not have been at issue had the Fourth Circuit addressed the disparate application.

Finally, unlike *Riesbeck Food Markets*, the D.C. Circuit did not address the impact of disruption that might occur from certain solicitations. Recall that in *Riesbeck Food Markets*, the 4th Circuit stated that since charitable solicitations posed no threat of disruption to the business, while union protests did, the employer was allowed to discriminate in such a manner.⁹⁷ The D.C. Circuit never discussed the potential disruption to the hospital's operations that could occur.

5. *Four B v. NLRB*

In 1998, the Tenth Circuit muddled the waters regarding discriminatory conduct of employers in barring certain solicitations.⁹⁸ The grocery store barred solicitation of "team members" within its stores.⁹⁹

95. *Id.* at 588.

96. *Id.* at 589.

97. *See supra* note 86.

98. *Four B v. NLRB*, 163 F.3d 1177 (10th Cir. 1998).

99. The non-solicitation policy stated as follows:

[T]here must be no solicitation or distribution of literature of any kind by any team member during the actual working time of the team member or soliciting or the team member being solicited. Persons who are not Company team members may not solicit or distribute literature for any purpose in any customer area, working area or any area restricted to Company team members. There must be no solicitation or distribution of literature of any kind by persons in customer service areas or shopping areas of the store during those hours when the store is open for business.

Union agents entered the grocery store and attempted to solicit the company's employees in an organizational drive. Following their ejection by management, the agents began to solicit employees in the parking lot and sidewalks surrounding the store during the employees' non-working time. The grocery store had, in the past, allowed other groups to solicit in the parking lot and sidewalks. Nonetheless, management again ejected the union agents from the property.¹⁰⁰

The ALJ found that the employer did not violate § 8(a)(1) when it barred the union agents from the parking lot and sidewalk. The ALJ based its decision on the fact that the employer had only allowed solicitations of its customers in the past, and not employees. Since the union was soliciting employees and not customers, the ALJ reasoned that the employer was legally entitled to ban such solicitations.¹⁰¹

The NLRB rejected the ALJ's distinction of the employer's discrimination based on audience. The Board held that a discriminatory motive could be inferred from the fact that the employer allowed non-union solicitations in its parking lot, but barred union solicitations. The Board found irrelevant the employer's argument that it was entitled to bar the union agents since they were soliciting employees, whereas the nonunion solicitors only approached customers.¹⁰²

The Tenth Circuit upheld the NLRB's finding. Section 8(a)(1) forbids employers from engaging in anti-union animus in attempting to bar the organization of employees. The court found that when the management of Four B removed the union agents from its parking lot and sidewalks, it was motivated by anti-union animus.¹⁰³ The court also stated that the ban fell outside the employer's written policy. Management was entitled to bar the union agents from soliciting while the employees were within the store. However, the employer was not entitled to take such action once the employees left the premises.¹⁰⁴

Several points are noteworthy in the court's holding. First, the Tenth Circuit never took issue with Four B's property right to exclude. It is quite possible that the management of Four B could have espoused the argument that it had a vested right to exclude others from its parking lot based on traditional notions of property law (i.e., trespass).

Id. at 1179.

100. *Id.* at 1181.

101. *Id.* at 1180.

102. *Four B*, 163 F.3d at 1184.

103. *Id.*

104. *Id.*

Second, Four B argued that its policy of allowing non-union solicitors on the parking lot and sidewalks fell under the exception for “beneficent acts” stated first by the Board in *Be-Lo*, reiterated in *Lucile Salter Packard*.¹⁰⁵ Although the Court rejected the argument, it did give consideration to the employer’s position. In overturning the Board’s finding of a § 8(a)(1) violation in *Be-Lo Stores*, the Fourth Circuit refused to give consideration to exceptions existing. Rather, the Fourth Circuit stated that no violation occurs where the employer disparately enforces a non-solicitation policy.¹⁰⁶ One year after the Fourth Circuit turned a blind eye to granting exceptions to employer discrimination, the Tenth Circuit in line with the D.C. Circuit, implied that certain exceptions do exist. This is a clear conflict between the Circuits.

III. ANALYSIS

The Analysis section of the article will first address the necessity of granting unions nonemployee access to employer property. Part B of the Analysis will draw conclusions regarding the current debate between the NLRB and the courts, and between the courts themselves. Part C of the Analysis will attempt to discern what the Supreme Court truly meant by the word “discriminate. And finally, justifications will be put forward for a narrowed tailoring of the Supreme Court’s exception for “discrimination”.

A. *Do The Unions Need This Access?*

1. Union Organizational Efforts

A common argument made by unions in lobbying the courts to allow nonemployees to have access to employer property is that such access is a prerequisite to successful organizing campaigns.¹⁰⁷ One of the clear purposes of the NLRA, argue unions, was to allow employees the right to organize so as to bargain collectively.¹⁰⁸ Thus, unions argue that the Supreme Court’s decision in *Lechmere* represents a

105. See *Lucile Salter Packard Children’s Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996); see also *Be-Lo Stores*, 318 N.L.R.B. 1 (1995).

106. *Be-Lo Stores v. NLRB*, 126 F.3d 268, 278 (4th Cir. 1997).

107. Alan L. Zmija, *Union Organizing After Lechmere*, Inc. v. NLRB – *A Time to Reexamine the Rule of Babcock and Wilcox*, 12 HOFSTRA LAB. & EMP. L.J. 65, 66 (1994). Zmija argues, “[u]nion organizing activity performed by employees is important, but it pales in comparison to efforts conducted by professional nonemployees.” *Id.*

108. 29 U.S.C. § 151 (1988). “The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce” *Id.*

clear roadblock to the effectuation of Congress' intent in formulating the NLRA: to empower employees with the right to organize. This intent is clearly set out in § 1 of the NLRA.¹⁰⁹ However, Congress does not state in the NLRA whether nonemployees may engage in organizing activity so as to meet the Act's purpose. The NLRA limits this right to "employees".¹¹⁰

Do unions have an argument that the involvement of nonemployees in organizing activities is essential for fulfilling the purpose of the NLRA? Unions will cite the declining nature of organized labor as testimony to their argument that *Lechmere* doesn't allow for the NLRA's purpose to be realized. Unions will argue that their numbers have decreased partly because union officials, as a result of *Lechmere*, do not have access to employees so as to appeal to them.¹¹¹

Unions have witnessed a general decline in membership since 1983. In 1983, the percentage of unionized members among the workforce was 20.1%. In the year 2000, this number was 13.5%.¹¹² Although the decrease is substantial, these percentages fail to reflect the fact that union membership has rebounded slightly in the past several years. In the year 1999 alone, union membership increased by more than 265,000 workers. This increase represented the largest increase in more than two decades. Within this increase, private sector membership increased by over 112,000 – nearly double what the previous highest increase had been in the last twenty years.¹¹³ The previous year, 1998, saw almost the exact increases in membership.¹¹⁴ The year 2000 did see a slight decrease in the number of unionized members, from 16.48 million to 16.3 million.¹¹⁵ Nonetheless, unionization has been up since 1998.

Membership statistics are pertinent to our analysis because unions may argue that their numbers have been down as a result of the

109. *Id.*

110. 29 U.S.C. § 152(3) (1988). The NLRA defines 'employee' as such: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise" *Id.*

111. Zmija, *supra* note 107, at 70.

112. United States Department of Labor – Bureau of Labor Statistics, Union Members Summary (2000), available at <http://www.bls.gov/news.release/union2.nr0.htm> (last visited Jan. 30, 2002) (These figures do comprise both public sector and private sector unionization. When the two groups are split, public sector membership rates are substantially higher – 37.5% within the public sector as compared to 9.0% in the private sector).

113. AFL-CIO, available at <http://www.aflcio.org/publ/press2000/pr0119.htm> (last visited Feb. 6, 2002).

114. AFL-CIO, available at <http://www.aflcio.org/publ/press1999/pr0611.html> (last visited Feb. 6, 2002).

115. See *supra* note 112.

Court's holding in *Lechmere*. However, perhaps more pertinent to the effect of *Lechmere* on unions is the increased commitment unions have made to their organizing efforts. Between 1995 and 1999, the American labor movement's total budgetary allocation made to organizational resources doubled.¹¹⁶ In the year 2000, the AFL-CIO trained more than 2000 people to work solely on organizational campaigns – this number represents a third more than it trained in 1999.¹¹⁷

Unions may argue that these increases are a direct result of their need to find alternative means of accessing employees for the purposes of organizing. In looking at the numbers of increases in membership over this period, the argument could be made that these increases in budgetary allocations have had an effect on membership. Yet, it is extremely hard to overlook the impact the overall state of our nation's economy has upon unionization. Where increases in production in the manufacturing and building sectors occur, union membership increases will occur. Manufacturing and general building production numbers were up for the time period that unions saw increases during the late 1990s.¹¹⁸ Thus, it is hard to estimate what impact the increases in organizational budgets throughout the labor movement had upon membership numbers.

As stated, union membership numbers have been declining since 1983. This seems to belie the argument made by unions that a large percentage of the decrease in their numbers can be attributed to their inability to reach many employees as a result of *Lechmere*. If union numbers were on the decline before *Lechmere* in 1992, can unions honestly argue that *Lechmere* has aggravated these decreases? A larger drop in union organization numbers would help the labor movements' claims here. However, since these numbers have steadied and organizational numbers were on the decline before *Lechmere*, it appears that the labor movement's argument is refuted here.

2. Salting and Finding Other Ways to Reach the Workforce

In 1995, the Supreme Court addressed whether salting was a legal tactic for unions to employ in organizational activities. Salting occurs where a union sends one of its organizers into a business seeking employment.¹¹⁹ Once employed, the organizer is entitled to § 7 rights

116. *Id.*

117. *Id.*

118. *Id.* Union membership numbers have, historically, been most highly correlated to the general state of our economy. Where the economy is booming in the trade and manufacturing sectors, membership numbers will be up, and vice versa.

119. *Supra* note 12.

under the NLRA and may solicit employees.¹²⁰ In *Town & Country*,¹²¹ the Supreme Court found that it was a violation of § 8(a)(1) and § 8(a)(3)¹²² for an employer to refuse to hire or release from employment an employee on the basis that he or she is a paid union organizer. The Court found that in defining "employee" in the NLRA, Congress intended a broad reading. The language of the Act was "broad enough to include those company workers whom a union also pays for organizing."¹²³ Thus, employers were no longer able to discriminate against union organizers in hiring or replacing such workers.

As a result of the decision, unions were granted the right to send organizers into a workplace and seek employment. Once employed, the organizer was entitled to § 7 rights and could solicit employees on its own time¹²⁴ to join the union. According to the Court, salting was a legal tactic.

Town & Country softened the blow unions sustained three years earlier in *Lechmere*. Although union organizers could be prohibited from an employer's property under *Lechmere*, they could not be prohibited from gaining employment. *Town & Country* forbade dismissals or refusals to hire based on union affiliation.

It is unknown whether the Court's holding in *Town & Country* has had a significant impact on union organization. Yet, it is obvious that the Court's decision in *Town & Country* can be viewed as supportive of union membership, whereas *Lechmere* had the opposite effect.

In *Lechmere*, the Supreme Court suggested that unions, in the past, have found success in organizing campaigns through advertising, as well as "via mailings, phone calls, and home visits."¹²⁵ The Court stated, "direct contact, of course, is not a necessary element of 'rea-

120. *Id.*

121. NLRB v. *Town & Country Elec., Inc.*, 516 U.S. 85 (1995).

122. 29 U.S.C. § 158 (a)(3) (1988). Section 8(a)(3) provides in relevant part: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." *Id.*

123. *Town & Country Elec., Inc.*, 516 U.S. at 90.

124. See *supra* notes 42-43. Recall that in *Republic Aviation*, the Supreme Court stated that employees, in the exercise of their § 7 rights, may not be prohibited by an employer from soliciting other employees for organizational purposes, so long as the employees' activity is done on their own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

125. The Court noted that the union organizers prior to trespassing on the employer's property recorded the license plates of the employees' cars and then with the assistance of the local Department of Motor Vehicles received the employees' names. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 530 (1992). The union then sent these employees information pertaining to its labor organization. *Id.* As well, the union placed full-page advertisements in the local newspaper. *Id.* at 540.

sonably effective' communication."¹²⁶ These statements suggest that the Court believes the labor movement can be successful in organizing campaigns without being given non-employee access. "Access to employees, not *success* in winning them over, is the critical issue."¹²⁷ So long as unions have a point of access to employees, they have the ability to win them over. This point, combined with the Court's holding in *Town & Country*, provide a strong argument that unions retain sufficient channels of communication to send their message to employees.

Recall that in *Cleveland Real Estate Partners*, the Sixth Circuit stated that no labor movement policy would be advanced by allowing union activities to occur based on the notion that the employer shopping mall was discriminating by allowing other solicitations.¹²⁸ In this statement, the Sixth Circuit rejects the notion that the purpose of the NLRA is impeded where non-employee, union organizers are refused access. The court's statement shows a reluctance to read into the NLRA that the rights of an "employee" include the right to be solicited by union organizers where these organizers are not employed. If other courts adopt this policy, unions' arguments for access based on the effectuation of the NLRA's purpose will not go far.

B. *Summary Of The Broad Guidelines In Current Law*

The current state of the law regarding nonemployee access is a "conflicting and an unworkable set of rules."¹²⁹ The existing caselaw is illustrative of the confusion that exists.¹³⁰ Employers are not sure of their right to exclude because the Supreme Court has yet to define what amounts to discrimination and a violation of § 8(a)(1) in excluding nonemployee union organizers/protesters. Unions, likewise, are not sure when they may be able to protest or organize in the face of an employer's ban on solicitation. Some broad conclusions may be drawn, however.

First, in order to enforce a no solicitation policy against unions, the policy must have been put in place before the union begins its activities. "When faced with a union organizing campaign an employer may not for union reasons promulgate a no-solicitation and/or no-distribution rule."¹³¹ To do so, would clearly be a violation of § 8(a)(1).

126. *Id.*

127. *Id.*

128. *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

129. Zmija, *supra* note 107, at 70.

130. *See supra* Part II.

131. 1-5 Nat'l Lab. Rel. Act: Law & Prac. (MB) § 5.05 (2002).

Second, if an employer has a no solicitation policy in place and is not allowing solicitations by any group (whether related to the union, or charitable in nature), nonemployee, union organizers will have no basis for claiming a violation of § 8(a)(1).¹³² If the employer has a vested property interest, it has the right to exclude others. Recalling *Sears, Roebuck*,¹³³ an employer may rely on state trespass laws to exclude others from its property where the employer is not challenging the legality of a protest. Where an employer enforces a no-solicitation policy even-handedly, unions have no remedy.

Lechmere posits that non-employee union organizers may claim that they are entitled to access where no reasonable alternative means of access exist.¹³⁴ The union has the burden of showing such. *Lechmere* places great restrictions on where a union will be successful in such a showing.¹³⁵ Existing case law gives no examples of where a union has been successful in arguing that access must be granted based on the fact that no alternative means of communication exist.

C. *What Did The Supreme Court Truly Mean By "Discriminate"?*

In *Lechmere*, the Supreme Court reiterated the stance taken in *Babcock* that a union must be given access to an employer's property if the "employer's access rules discriminate against union solicitation."¹³⁶ What the Court meant by 'discriminate' is the crux of the issue. As discussed, the NLRB and the Federal Circuits have hotly debated this issue.

The Supreme Court failed to define what it meant by 'discriminate' by not citing instances where access must be granted. It left the decision of what amounts to discrimination to the NLRB and the lower courts. These bodies have struggled to bring consistency to the term. Did the Supreme Court mean that an employer only discriminates when it allows another union to solicit to the exclusion of another, or

132. See *supra* note 67. Unless, the union can make a claim that no alternative means of communication exist so as to convey their message to employees, and in the absence of discrimination, they have no claim that § 8(a)(1) has been violated. Recall *Lechmere*: where employees are situated in a secluded setting (i.e., logging and mining camps), employers may be forced to grant non-employee union organizers access. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

133. See *supra* note 35.

134. See *supra* note 67.

135. *Id.* By stating that alternative means of communication do not exist in situations where employees are secluded (i.e., logging camps, mountain resort hotels), the Court in *Lechmere* indicated that alternative means of communication do exist where employees are not secluded. Thus, where an employer bans solicitation and the union has the ability to gain access to them off company premises, unions have no argument based on this exception.

136. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992) (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)).

did the Court intend for a broader reading of 'discriminate' so as to encompass instances where an employer allows charitable solicitations on its property while excluding union solicitations?

1. Picking One Union Over Another

Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."¹³⁷ The purpose of this Section was to outlaw the formation of "company unions."¹³⁸ However, Congress also contemplated "subtle, but conscious economic pressure."¹³⁹ A case could obviously be made that an employer violates § 8(a)(2) when it allows one union to solicit information on its property in the face of a solicitation ban while excluding other unions from doing so.

The Supreme Court would have cleared up all the confusion by stating that this scenario was what it had in mind when it made the discrimination exception in *Babcock*. The NLRB has yet to hear a § 8(a)(2) in the context of a union claim for access. Nonetheless, recall that the Sixth Circuit in *Cleveland Real Estate Partners* stated that this was what the Supreme Court meant by discrimination.¹⁴⁰

However, unions, and possibly the NLRB, will make the case that such a narrow reading of 'discriminate' is inconsistent with what the Court meant. Unions could possibly argue that since the Court never mentioned § 8(a)(2) in its discussion of discrimination in *Babcock* or *Lechmere*, the Supreme Court didn't intend this narrow reading. Unions may state that had the Supreme Court intended to narrow the discrimination exception to instances where an employer allows one union to solicit to the exclusion of the other, the Court would have addressed whether such 'assistance' amounts to both discrimination, and a violation of § 8(a)(1), as well as a violation of § 8(a)(2). On the other hand, did the Court intend to prevent charitable organizations from soliciting through a broad reading of 'discriminate'?

137. 29 U.S.C. § 158(a)(2) (1988). It is important to note that before a finding of a violation of § 8(a)(2) may be found, a finding of a labor organization must be found. "Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition" *Electromation, Inc.*, 309 N.L.R.B. 990, 994 (1992), *enforced*, 35 F.3d 1148 (1994).

138. S. REP. NO. 573, at 9-11 (1935), *reprinted in* ARCHIBALD COX, ET AL., *LABOR LAW* 196 (2000).

139. *Id.*

140. *See supra* note 82.

2. What are "Isolated Beneficent Acts"?

Recall that in *Be-Lo Stores*, the NLRB carved exceptions to its stance that an employer's discrimination of union activities amounts to a violation of § 8(a)(1). One of these exceptions was for "isolated beneficent acts."¹⁴¹ Although some Circuits have rejected the exceptions arguing that when an employer allows charitable solicitations it is not discriminating,¹⁴² other Courts have given consideration to such exceptions¹⁴³ existing for an employer's discrimination against a union. Although the Circuits that have favored such consideration have rejected the employer's acts as fitting the exceptions, their willingness conflicts with other circuits.

When the Supreme Court in *Babcock* stated that an employer must grant a union access to its property if it is discriminating in its non-solicitation policy, it did not state that exceptions to this rule exist. Thus, why does the Board carve such exceptions in *Be-Lo Stores*?

The Board in *Be-Lo Stores* clearly misinterpreted *Babcock* and *Lechmere*. There clearly are two possible interpretations of *Babcock* and *Lechmere*: 1) The Court believed that an employer could not discriminate between a union and other groups such as charitable organizations in enforcing solicitation policies; or 2) The Court believed 'discriminate' was confined to instances where an employer allows one union to solicit to the exclusion of another. Under the second interpretation, charitable organizations don't fit the word 'discriminate'.

Allowing for "isolated beneficent acts" is discriminating! It was clearly hypocritical for the Board in *Be-Lo Stores* to state that an employer may discriminate sometimes in 'isolated' instances, but it may not discriminate all the time. How can the Board say that some 'isolated' beneficent acts may be allowed in the face of a no-solicitation policy, but others may not? Such a precedent provides no bright line rules for employers and unions to follow. The Board should have stated all beneficent acts, or no beneficent acts may be allowed. Courts that have followed the Board's precedent are simply confusing what 'discriminate' means. Would it be legal for an employer to discriminate in the hiring of minority applicants sometimes, but not all the time?

141. See *supra* note 72.

142. See *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

143. See *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996); see also *Four B v. NLRB*, 163 F.3d 1177 (10th Cir. 1998).

The NLRB's holding in *Be-Lo Stores* confuses employers and unions alike. Neither party has clear guidance under this reasoning as to when an employer has committed a § 8(a)(1) violation.

D. *An Employer Has A Right To Exclude*

Sears, Roebuck held that an employer's action of ejecting union protesters from its premises falls under state trespass law, and the NLRA does not preempt such law so as to enable unions to protest on an employer's premises, free and clear of any trespass law.¹⁴⁴ "Sears provides an indication that private property rights, while not absolute, will generally be afforded more protection than § 7 rights."¹⁴⁵ Does a right to exclude mean that an employer may exclude one group while refraining from excluding another?

When the union attempts to engage in such activities on company premises, the employer has the right to eject them based on state trespass law. Hypothetically, if the Supreme Court were to find that an employer has violated the NLRA when it ejects union protesters while allowing for charitable solicitations, an employer's ability to defer to state trespass law would be undercut. Such a holding by the Supreme Court could also be viewed as overturning *Sears, Roebuck*. The Court, in such a finding, would implicitly be holding that § 7 rights trump private property rights.

E. *An Employer Has The Right To Run The Business*

Although charitable solicitations have the potential to disrupt the flow of business activity, they do not pose nearly the threat of union activities. A union's activities, whether they are organizational in nature or for the purpose of protest, have the potential to disrupt the business of the employer who is being targeted.¹⁴⁶ Often a union's purpose in conducting protest activities is to undercut the business' patronage. This disruption threatens a business' viability. Unions will often engage in these protest activities through the use of billboards and holding pickets off company premises. Such activities have less potential for disrupting the business since their message is usually con-

144. See *supra* note 35.

145. Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317, 1327 (1992).

146. Often disrupting the course of the employer's business is the focus of protest activities. For instance, in *Cleveland Real Estate Partners*, the union protesters clearly were engaged in the activity intending to draw business away from the employer who was hiring non-union employees.

veyed away from the employer's premises. These activities may be just as effective as activities on the employer's premises.

Recall that in *Riesbeck Food Markets*, the Fourth Circuit recognized that certain union activities, namely protest activities, have the potential of undermining the business purposes of the employer.¹⁴⁷ This recognition shows that courts may be willing to delineate between the harmful effects union protests can cause business interests and the neutral position of charitable groups. This justification in *Riesbeck* is one basis the Supreme Court should use in narrowing the discrimination exception.

An employer retains entrepreneurial rights in operating the business. The Supreme Court implicitly recognized such a right in *Textile Workers Union v. Darlington Manufacturing Co.*,¹⁴⁸ in finding that it was within the employer's discretion to close a business based on anti-union animus. The most fundamental entrepreneurial right of a business is the decision whether to be in business in the first place.¹⁴⁹ Such entrepreneurial rights will often come in conflict with the effectuation of § 7 rights. Thus, finding a balance between an employer's entrepreneurial rights and § 7 rights is not an easy task.

Another point that must not be forgotten is the overarching purpose of the NLRA. Congress enacted the NLRA to improve our nation's capitalist structure and remove burdens placed on the flow of commerce by labor disputes.¹⁵⁰ When Congress enacted the NLRA, a major reason for doing so was to alleviate the burdens placed on commerce by disputes between employees and management.¹⁵¹ Where nonemployees disrupt business through protest and organizational ac-

147. *Riesbeck Food Mkts. v. NLRB*, Nos. 95-1766, 95-1917, 1996 U.S. App. LEXIS 17693, at *13 (4th Cir. 1996).

An employer must have some degree of control over messages it conveys to its customers on its private property . . . *Riesbeck* has a strong interest in preventing the use of its property for conduct which directly undermines its purposes, i.e., the sale of goods and services to *Riesbeck's* customers, which was implicated by the union's solicitations but not by the charitable solicitations.

Id.

148. 380 U.S. 263 (1965).

149. Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 7 (2000).

150. 29 U.S.C. § 151 (1988).

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Id. See also Malin & Perritt, *supra* note 148, at 6.

151. *Id.*

tivities on employer property, capitalism and the flow of commerce have the potential to be disrupted.

As stated, unions may argue that *Lechmere* has the effectuation of § 7 rights.¹⁵² However, employers may counter this argument by deferring to the real purpose of the NLRA. Where labor protests and organizing drives interrupt the operation of business, the Act's clear aim of improving capitalism is not realized.

F. *Can The Unions Survive Lechmere?*

Protecting an employer's property rights and the capitalist system are strong arguments in favor of allowing employers to discriminate against nonemployee union organizers. Unions have strong arguments premised on § 7. So it is inevitable that the protection of employers' property rights and entrepreneurial rights, and the protection of § 7 rights cannot always coexist in this context. Although unions may not so easily concede so, they do have the ability to reach employees for the purpose of organizing, and reaching the general public for the purpose of protesting without being granted nonemployee access. In this way, § 7 rights may still be given cover while protecting the free flow of commerce and property rights.

As stated, the Supreme Court's ruling in *Town & Country* softened the blow that unions sustained in *Lechmere*. It may seem oxymoronic to prevent an employer from discriminating in refusing to employ union organizers, while allowing employers to discriminate against such organizers in having access to employer property for organizing. However, one basis for such a distinction may be the wealth of laws barring discrimination in the context of an employer's hiring decisions.¹⁵³ Clearly, it would have been hypocritical for the Court to allow employers to discriminate against union organizers while preventing such discrimination on the basis of other categories.¹⁵⁴ The Supreme Court may be implying that a tradeoff is in order. An argument can be made that the Supreme Court will allow an employer to retain vested property rights based on state trespass law in exchange for barring discrimination in hiring practices.

152. *See supra* Part III.A.

153. Title VII of The Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to fail or refuse to hire any individual because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.S. § 2000e-2(a)(1) (2001). The American Disability Act (ADA) prevents an employer from discriminating on the basis of a disability. 42 U.S.C.S. § 12101 (2001).

154. *Id.*

Town & Country represents a clear victory for unions. Employers may not inquire into a prospective employee's union affiliations in making hiring decisions. An employee with union affiliations may come into a work setting and solicit employees during non-working time.¹⁵⁵ Such a scenario gives a union direct access to employees.

A union's ability to organize a workforce does not cease at the point of an employer's policy of no solicitation. Several alternative channels of communication exist. The access discussed in *Town & Country* represents just one avenue. Unions may also utilize newspapers, telephone and home solicitations.¹⁵⁶ Another avenue exists where unions find ways to discuss organizing drives with a small number of employees, attempting to spur a larger drive through this small group.

IV. CONCLUSION

Unions can survive without the access posited in *Lechmere*. Unions point to their general decreases in membership and the notion that § 7 rights are constrained by the Court's holdings in *Babcock & Wilcox* and *Lechmere* in arguing that employers may not discriminate against their solicitations while allowing charitable solicitations. Unions believe that the discrimination exception first enunciated in *Babcock & Wilcox*¹⁵⁷ forbids an employer from allowing other groups to solicit on their property while excluding unions. However, employers have several arguments to refute the labor movement's claims.

First, if the Supreme Court intended to bar an employer from allowing charitable solicitations while it also excluded unions why didn't it say so in *Lechmere*? The Court had a chance to clear the air emanating from *Jean Country*.¹⁵⁸ Instead of deferring to the balancing test set forth by the NLRB in *Jean Country*,¹⁵⁹ the Court stated that such a test conflicts with its holding in *Babcock & Wilcox*. Since the Court never stated exactly what it meant by discrimination in *Lechmere*, it is argued here that the Supreme Court should revisit the issue. Second, an employer's rights to exclude based on state trespass laws and the Court's holding in *Sears, Roebuck*¹⁶⁰ suggest that an employer may eject unions from its employer's property without interfering with § 7

155. See *supra* note 43. Non-working time is equivalent to one's time spent while not working.

156. See *supra* note 124. Although the union in *Lechmere* was unsuccessful in organizing the workforce through such tactics, their failure is not dispositive of all union attempts.

157. See *supra* note 13.

158. See *supra* note 58.

159. *Id.*

160. See *supra* notes 32-35.

rights. Third, the idea that the flow of business and commerce have the potential to be interrupted by union activity on employer premises favor the ability of employers to prohibit unions from soliciting. This argument is partially based on the purpose of the NLRA.¹⁶¹ Fourth, Unions may point to their decreases in membership as a reason to disallow an employer's discrimination. Although, union membership numbers have declined in recent decades, it is hard for unions to argue that *Lechmere* was the impetus for such decreases. Fifth, the Sixth Circuit's deference to the furtherance of labor policies in *Cleveland Real Estate Partners* is persuasive for allowing employers to discriminate against unions. The Court stated "no relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature."¹⁶² This is given support by the final argument for allowing an employer to discriminate: Unions still have access to employees. The Court's holding in *Town & Country* allowing for salting and the alternative means of communication posited in *Lechmere* support the proposition that unions are still viable in organizing a workforce.

For the foregoing reasons, it is argued that the Supreme Court should revisit its holdings in *Lechmere* and *Babcock & Wilcox*. The Court should grant certiorari in the next case addressing the issue. The Court's holding should explicitly state that an employer may eject union solicitations while allowing for other groups to solicit, including, but not limited to charitable groups. The Court should explicitly state that 'to discriminate', in this context amounts to favoring one union over another, and thus amounts to a violation of § 8(a)(2).¹⁶³ As reasoning for such a holding, the Court should find persuasive an employer's vested property rights, its entrepreneurial control, as well as the vast array of alternative channels of communication available to unions.

161. See *supra* note 149.

162. See *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

163. See *supra* note 136.

